

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

JONES, et al.

Plaintiffs,

v.

VARSITY BRANDS, LLC, et al.,

Defendants.

Case No. 2:20-cv-02892-SHL-tmp

**DEFENDANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION TO
DISMISS AND TO STRIKE CLAIMS PREVIOUSLY DISMISSED AND MATERIAL
PREVIOUSLY STRUCK (ECF NO. 511)**

Plaintiffs do not dispute that in their Amended Complaint (ECF No. 490), they reasserted the same claims that this Court already dismissed and reasserted a “Nationwide Damages Class” that this Court previously struck. Their only explanation for doing so—contrary to the Court’s specific order not to “attempt[] to resurrect claims that have already been dismissed,” (ECF No. 487 at PageID 31530)—is the incorrect legal argument that they need to preserve appellate rights. (ECF No. 532, at PageID 33300.)¹ Plaintiffs also now say they “are not attempting to resurrect claims that have already been dismissed,” that they “do not contest the validity of the court’s prior rulings on Defendants’ original motions to dismiss and strike,” and that “the Court’s

¹ Plaintiffs’ position is plainly wrong. *See, e.g., Cosby v. KPMG, LLP*, No. 3:16-CV-121-TAV-DCP, 2021 WL 1845182, at *2 (E.D. Tenn. May 7, 2021) (granting motion to dismiss a claim in an amended complaint because “plaintiffs did not need to replead the claim to preserve the right to appeal its previous dismissal”) (citing *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 617 (6th Cir. 2014)). Although Plaintiffs express concern about references in *Hayward* to the potential waiver of claims dropped via “voluntary” amendment, the dropping of the previously-dismissed claims and Nationwide Damages Class from the Amended Complaint was not a “voluntary” matter given the Court’s order not “to resurrect claims that have already been dismissed.”

prior orders of dismissal remain in effect and control.” (*Id.*)

Although not required by the Local Rules, Defendants attempted to meet and confer with Plaintiffs on these issues to avoid burdening the Court with motion practice. Defendants suggested an agreed motion and proposed order confirming that the previously-dismissed claims and putative Nationwide Damages Class were no longer at issue in the case. Plaintiffs said the Court’s prior orders “spoke for themselves” and were unwilling to address the issue via stipulation. Plaintiffs’ reluctance to agree in writing on the status of the dismissed claims and Nationwide Damages Class necessitated Defendants filing the underlying opposed motion.

Plaintiffs accordingly provide no basis to deny Defendants’ motion to dismiss and to strike. If keeping the appellate record clear was Plaintiffs’ goal in not following the Court’s order, then an order re-dismissing their already dismissed claims and re-striking the material previously struck would be the best way to do that. Undersigned defendants accordingly request that the Court grant the motion (ECF No. 511) in its entirety.

Dated: December 6, 2023

Respectfully submitted,

s/ Matthew S. Mulqueen

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